

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

DELBERT CHARLES COBB,

Petitioner,

v.

E. K. McDANIELS, *et al.*,

Respondents.

Case No. 3:15-cv-00172-MMD-WGC

ORDER

I. SUMMARY

Before the Court are the second amended petition for writ of habeas corpus (ECF No. 17), respondents' motion to dismiss (ECF No. 32), petitioner's opposition (ECF No. 50), and respondents' reply (ECF No. 57). The Court grants the motion in part, finding that petitioner has not exhausted his available state-court remedies for some of his grounds.

II. DISCUSSION

Before a federal court may consider a petition for a writ of habeas corpus, the petitioner must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for relief, a petitioner must fairly present that ground to the state's highest court, describing the operative facts and legal theory, and give that court the opportunity to address and resolve the ground. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

1 “[A] petitioner for habeas corpus relief under 28 U.S.C. § 2254 exhausts available
 2 state remedies only if he characterized the claims he raised in state proceedings
 3 *specifically* as federal claims. In short, the petitioner must have either referenced specific
 4 provisions of the federal constitution or statutes or cited to federal case law.” *Lyons v.*
 5 *Crawford*, 232 F.3d 666, 670 (9th Cir. 2000) (emphasis in original), *amended*, 247 F.3d
 6 904 (9th Cir. 2001). Citation to state case law that applies federal constitutional principles
 7 will also suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (*en banc*). “The
 8 mere similarity between a claim of state and federal error is insufficient to establish
 9 exhaustion. Moreover, general appeals to broad constitutional principles, such as due
 10 process, equal protection, and the right to a fair trial, are insufficient to establish
 11 exhaustion.” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted).

12 Ground 1 is a claim that the prosecution peremptorily struck two prospective jurors,
 13 named Carter and Dawson, because of their race. *See Batson v. Kentucky*, 476 U.S. 79
 14 (1986). Respondents argue that ground 1 is not exhausted with respect to Carter because
 15 on direct appeal petitioner challenged the removal of a juror named Gardner. (Exh. 151
 16 at 21-23 (ECF No. 25 at 24-26).) Respondents have revealed a comedy of errors. The
 17 problem started when Rhonda Carter and Roberta Gardner were seated as prospective
 18 jurors. The names were similar enough to be confusing, but there was more. Carter had
 19 badge number 884, and Gardner had badge number 886. (Exh. 121a, lines 3 and 25
 20 (ECF No. 23-3).) To make things worse, the transcript of jury selection has a mistake:

21 MR. DiGIACOMO [prosecutor]: . . . There’s a couple of specific questions I
 22 had for the three of you. Let me start with Ms. Carter. And let me preface
 23 this with, I have no desire whatsoever to embarrass you, but there’s some
 stuff in your questionnaire that I need to talk to you about, okay? And
 specifically, it relates to your son.

24 PROSPECTIVE JUROR GARDNER: Yes.

25 (Exh. 111 at 17-18 (ECF No. 22 at 18-19) (emphasis added).) The transcript continued,
 26 with the prosecutor or the judge saying “Carter” and the person answering questions
 27 identified as “Gardner.” Defense counsel then asked prospective jurors who were African
 28 American to raise their hands and to say their badge numbers. The transcript shows that

1 Carter said “884.” (*Id.* at 25 (ECF No. 22 at 26).) According to the jury list, the prosecution
 2 peremptorily struck Carter, and the defense peremptorily struck Gardner. (Exh. 121a,
 3 lines 3 and 25 (ECF No. 23-3).) The defense counsel raised a *Batson* challenge. He
 4 stated:

5 MR. WHIPPLE: Thank you, Your Honor. Your Honor, during the jury —
 6 during jury selection and when we were doing preempts, the government
 7 preempted Juror No. 639, Mrs. Dawson. They also prior to that preempted
 8 Juror No. 884, Mrs. Carter. Ms. Carter, of course, is African American. That
 left one remaining African American on the jury pool. That was Mrs.
 Dawson. They also preempted her.

9 (Exh. 111 at 261 (ECF No. 22 at 262).) The opening brief on direct appeal made the error
 10 worse: “The State also preempted Juror Number 884, Mrs. Gardener (an African
 11 American).” (Exh. 151 at 21 (ECF No. 25 at 24) (emphasis added).) Appellate counsel,
 12 who was different from trial counsel and who was not present at jury selection, now used
 13 the incorrect name and the correct badge number. The error continued in the answering
 14 brief and the reply brief. (Exh. 153 at 13-14 (ECF No. 25-2 at 15-16); Exh. 154 at 4-9
 15 (ECF No. 25-3, at 6-11).) The initial petition in this Court also continued with the error.
 16 (ECF No. 5 at 8-9.) Finally, in the second amended petition, petitioner got the name
 17 correct. (ECF No. 17 at 16.)

18 Hoping that it has sorted this mess out,¹ the Court is reasonably certain, but not
 19 completely certain, that petitioner has presented to the Nevada Supreme Court the
 20 identity of the correct person. Regardless of the confusion of the names and the confusion
 21 of saying that Gardner was badge number 884, petitioner has remained consistent in
 22 state court and this Court that juror number 884 was struck for impermissible reasons.
 23 That probably is enough for the Nevada Supreme Court to identify that petitioner was
 24 challenging the strike of Carter. If the jury list and the jury questionnaires, currently
 25 Exhibits 121a through 121i (ECF No. 23-3 through 23-13), were part of the record on
 26 appeal, then this Court would be more certain that the Nevada Supreme Court knew that

27 _____
 28 ¹The Court’s own proofreading of the prior paragraph has found at least one
 instance in which it transposed the names Carter and Gardner.

1 Carter was the juror in question. Carter's responses in her jury questionnaire match the
2 prosecutor's questions to the juror identified both as Carter and Gardner in the transcript.
3 This Court does not know if those exhibits were part of the record on appeal. The jury list
4 has a court-exhibit sticker, but none of them are file-stamped, and they lack the bates
5 number stamping found on Nevada appellate appendices. Nonetheless, with the badge
6 number being consistent throughout the proceedings, the Court will find that ground 1 is
7 exhausted with respect to Carter.

8 Respondents argue that ground 1 is not exhausted with respect to Dawson
9 because petitioner presents here a comparative juror analysis. (ECF No. 17 at 24-28.)
10 Petitioner did not present to the state courts any such analysis. (See Exh. 151 at 19-23
11 (ECF No. 25 at 22-26).) Nevertheless, the Court finds that the additional facts presented
12 in the comparative juror analysis do not fundamentally alter the claim regarding Dawson,
13 and this part of ground 1 is exhausted.

14 Ground 2 is a claim of ineffective assistance of counsel because (a) trial counsel
15 failed to object to the trial court's dismissal of prospective jurors Carter and Dawson
16 before holding a *Batson* hearing and (b) appellate counsel failed to raise this issue on
17 direct appeal. Petitioner admits that he has not presented this ground to the state courts.
18 Ground 2 is not exhausted.

19 Ground 3 is a claim that (a) African-Americans and (b) Hispanics were under-
20 represented in the jury venire. Respondents argue that petitioner never mentioned
21 Hispanics in his arguments to the Nevada Supreme Court. Respondents are correct. (See
22 Exh.151 at 23-27 (ECF No. 25 at 26-30).) Petitioner did mention minorities generally in
23 his opening brief on direct appeal. (Exh. 151 at 24 (ECF No. 25 at 27).) However,
24 petitioner presented no facts and no arguments with respect to Hispanic members of the
25 jury pool. He does that now. Ground 3(b), regarding Hispanics in the jury venire, is not
26 exhausted.

27 Ground 4 is a claim that petitioner received ineffective assistance of counsel
28 because (a) trial counsel did not object to the trial court's effective denial of the motion to

1 strike the jury venire, and (b) appellate counsel did not raise this issue on direct appeal.
2 Petitioner admits that he has not presented this ground to the state courts. Ground 4 is
3 not exhausted.

4 Ground 5 is a claim of trial-court error in refusing to sever the charges into two
5 separate trials. Respondents argue that the issue on direct appeal was presented solely
6 as a matter of state law.

7 Petitioner argues that the opening brief also stated, “[i]n presenting this
8 inadmissible hearsay evidence prohibited Mr. Cobb his constitutional rights of
9 Confrontation and cross-examination.” (Exh. 151 at 32 (ECF No. 25 at 35).) Improper
10 joinder of counts does not violate the Confrontation Clause of the Sixth Amendment.
11 Improper joinder can be a violation of due process. “[M]isjoinder would rise to the level of
12 a constitutional violation only if it results in prejudice so great as to deny a defendant his
13 [Fourteenth] Amendment right to a fair trial.” *United States v. Lane*, 474 U.S. 438, 446
14 (1986). Even if petitioner did present a constitutional theory to the Nevada Supreme
15 Court, he presented a constitutional theory that was both wrong and different from what
16 he presents now.²

17 Petitioner argues that he quoted *Floyd v. State*, 42 P.3d 249 (Nev. 2002), which in
18 turn quoted *People v. Bean*, 760 P.2d 996 (Cal. 1988). The portion of *Bean* — quoted in
19 *Floyd* that in turn petitioner quoted — was part of an analysis of state law regarding joinder
20 and severance of offenses. 760 P.2d at 1006. Later, the California Supreme Court did
21 analyze whether the denial of a motion to sever counts, though not an abuse of discretion,
22 still deprived the defendant a fundamentally unfair trial or due process of law. *Id.* at 1008.
23 This is what petitioner quotes at page 27 of his opposition of the motion to dismiss. (ECF
24 No. 50, at 33.) Petitioner’s argument has two problems. First, the Nevada Supreme Court
25

26 ²The Court is uncertain whether petitioner did even that. The relevant paragraph
27 in the direct-appeal brief contains sentence fragments, and it is disjointed. For example,
28 petitioner stated that he did have the opportunity to confront the witnesses against him,
right before he claimed that he was deprived of his right of confrontation. (Exh. 151 at 32
(ECF No. 25, at 35).)

1 did not quote that part of *Bean* in its opinion in *Floyd*. Second, *Bean* referred to generic
2 concepts of a “fair trial” and “due process” without explicitly mentioning any part of the
3 Constitution of the United States. Generic statements like that do not exhaust a ground.
4 *Hiivala v. Wood*, 195 F.3d at 1106.³ Ground 5 is not exhausted.

5 Ground 7 is a claim of trial-court error in admitting prior-bad-act evidence.
6 Respondents contend that petitioner argued the issue on direct appeal solely as a matter
7 of Nev. Rev. Stat. § 48.045, not federal law. Respondents also argue that petitioner did
8 not mention on direct appeal certain names and facts that he mentions in this ground.
9 Petitioner counters that the state-law standard for admitting such evidence is at least as
10 protective as the federal standard, if not more, of a defendant. Respondents correctly
11 point out that that is the not the rule for satisfaction of the exhaustion requirement. The
12 standards must be the same, and, in the case of admission of prior-bad-act evidence,
13 they are not.

14 The Court need not address respondents’ argument that petitioner also did not
15 present the names of some witnesses to the Nevada Supreme Court, because ground 7
16 in its entirety is not exhausted.

17 Ground 13 is a claim that petitioner’s consecutive sentences of life imprisonment
18 without eligibility for parole are cruel and unusual punishment because he was 16 years
19 old when he committed murder. Petitioner admits that he has not presented this claim to
20 the state courts. Ground 13 is not exhausted.

21 Ground 14 is a cumulative-error claim regarding errors at trial and ineffective
22 assistance of counsel. Respondents argue correctly that petitioner did not raise a
23 cumulative-error claim on direct appeal, and that the claim of cumulative error in the state
24 habeas corpus petition involved trial counsel’s errors, so any claim of cumulative error
25

26 ³In *Bean*’s case, the Ninth Circuit later held that the joinder of offenses was
27 unconstitutional. *Bean v. Calderon*, 165 F.3d 1073, 1083-86 (9th Cir. 1998). Petitioner
28 does not make this argument, but the Nevada Supreme Court was not required to
Shepardize a case quoted in another case quoted in the brief to find an issue of federal
law.

1 that does not involve trial counsel's errors, e.g., trial court error or ineffective assistance
2 of appellate counsel, is unexhausted. Ground 14 is not exhausted.

3 Petitioner argues that any claim that the Court finds to be not exhausted is
4 technically exhausted because he has no remaining procedure in state court to present
5 those claims. See 28 U.S.C. § 2254(c). Petitioner argues that the state courts would apply
6 state-law procedural bars against untimely petitions, Nev. Rev. Stat. § 34.726(1), and
7 successive petitions, Nev. Rev. Stat. § 34.810. However, state courts may excuse a
8 procedural bar upon a showing of actual innocence or cause and prejudice. Petitioner
9 argues that he is actually innocent. This is an argument that he needs to present to the
10 state courts first.

11 Petitioner also argues that the ineffectiveness of post-conviction counsel is cause
12 to excuse the procedural default of his claims of ineffective assistance of counsel. The
13 Nevada Supreme Court has not recognized ineffective assistance of post-conviction
14 counsel as cause to excuse state-law procedural bars. *Brown v. McDaniel*, 331 P.3d 867
15 (Nev. 2014). The Court will not address this argument now because petitioner does have
16 an argument—actual innocence—that he can use in the state courts.

17 Petitioner has filed a motion for evidentiary hearing (ECF No. 51). He wants to
18 provide evidence in support of his arguments for actual innocence and ineffective
19 assistance of post-conviction counsel. The Court denies this motion because petitioner
20 needs to present his argument for actual innocence first to the state courts.

21 The second amended petition (ECF No. 17) is mixed, containing both claims
22 exhausted in state court and claims not exhausted in state court, and it is subject to
23 dismissal. See *Rose v. Lundy*, 455 U.S. 509, 521-22 (1982); *Szeto v. Rushen*, 709 F.2d
24 1340, 1341 (9th Cir. 1983).

25 Respondents also argue that ground 14 is not addressable in federal habeas
26 corpus because the Supreme Court of the United States has not clearly established that
27 such a claim exists. Respondents point to a split of authority among the circuits.
28 Respondents present an interesting question, but it is one that the Supreme Court will

1 need to answer. The court of appeals for this circuit has held that such a claim is clearly
2 established, and that is binding precedent upon this court. *Parle v. Runnels*, 505 F.3d
3 922, 927 (9th Cir. 2007).

4 Respondents also argue that some of the grounds in the second amended petition
5 (ECF No. 17) are untimely. Petitioner argues that the grounds relate back to the filing of
6 the initial, proper-person petition (ECF No. 5). Petitioner also argues that his actual
7 innocence will equitably toll the period of limitation. However, petitioner needs to present
8 that actual-innocence argument first to the state courts. Under the circumstances, the
9 Court will not rule now on the timeliness of the challenged grounds.


10 **III. CONCLUSION**

11 It is therefore ordered that respondents' motion to dismiss (ECF No. 32) is granted
12 in part. Grounds 2, 4, 5, 7, 13, 3 in part, and 14 in part are unexhausted.

13 It is further ordered that petitioner will have thirty (30) days from the date of entry
14 of this order to file a motion for dismissal without prejudice of the entire petition, for partial
15 dismissal of grounds 2, 4, 5, 7, 13, 3 in part, and 14 in part, or for other appropriate relief.
16 Within ten (10) days of filing such motion, petitioner must file a signed declaration under
17 penalty of perjury pursuant to 28 U.S.C. § 1746 that he has conferred with his counsel in
18 this matter regarding his options, that he has read the motion, and that he has authorized
19 that the relief sought therein be requested. Failure to comply with this order will result in
20 the dismissal of this action.

21 It is further ordered that petitioner's motion for evidentiary hearing (ECF No. 51) is
22 denied.

23 DATED THIS 28th day of March 2017.

24
25 
26 MIRANDA M. DU
27 UNITED STATES DISTRICT JUDGE
28